No. 83992-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL D. WILLIAMS,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER WILLIAMS

On review from the Court of Appeals, Division Two,
and the Superior Court of Pierce County

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RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. ASSIGNMENTS OF ERROR ON REVIEW

1. The statute defining the crime of obstruction of a police officer does not apply to pure speech, which is instead governed by the statute criminalizing making a false or misleading statement to police.

2. Petitioner Michael Williams was deprived of effective assistance of counsel when counsel failed to object to application of the obstruction statute to his pure speech.

B. ISSUES PRESENTED FOR REVIEW

The statute defining the crime of obstruction criminalizes acts which wilfully hinder, delay or obstruct a police officer in carrying out his or her official duties. In State v. White, 97 Wn.2d 92, 95, 101, 640 P.2d 1061 (1982), State v. Grant, 89 Wn.2d 678, 685-86, 575 P.2d 210 (1978), State v. Williamson, 84 Wn. App. 37, 924 P.2d 960 (1996), State v. Hoffman, 35 Wn. App. 13, 16, 664 P.2d 1259 (1983) and State v. Swaite, 33 Wn. App. 477, 483, 656 P.2d 520 (1982), this Court and the courts of appeals have held that to "hinder, delay or obstruct" requires conduct or conduct mixed with speech but does not apply to pure speech. Division Two in this case nevertheless held that the obstruction statute applied to pure speech and that Williams could be convicted of obstruction for giving a false name to police.

1. Did Division Two err in failing to apply the rule of lenity to interpreting RCW 9A.76.020 where reasonable minds can obviously differ about the proper interpretation and application of that statute, as the different interpretations by other courts and Division Two in this case make clear?

2. Did Division Two err in failing to follow the mandates of *stare decisis* by either following or deciding not to follow the prior caselaw interpreting the relevant language?

3. The statute has been amended several times since the various courts have held that the "hinders, delays or obstructs" language

applies to conduct, not pure speech, yet the Legislature never indicated any disagreement with that interpretation. Did Division Two further violate the principles of statutory construction by failing to apply the mandates of State v. Bobic, 140 Wn.2d 250, 264, 996 P.2d 610 (2000), which hold that the Legislature is deemed to be aware of court interpretations of statutory language and the failure to amend that language or indicate a disagreement with prior court interpretations indicates acquiescence?

4. Where the history of the crimes of obstruction and making a false or misleading statement make it clear that the "hinders, delays or obstructs" language and the obstruction statute itself is intended to apply only to conduct or conduct mixed with speech, should this Court follow its holdings on that point and overrule the erroneous decision by the court of appeals in this case?

C. STATEMENT OF THE CASE RELEVANT TO REVIEW[1]

Federal Way Police Department officer Scott Parker went to a home to investigate a theft allegation and spoke to a man who identified himself as Eric R. Williams. 1RP 44, 47, 56, 71. When Williams said he had no identification, Parker asked if Williams had any other way to identify himself and Williams said he had a relative living in Federal Way.

[1] More detailed discussion of the procedural facts and evidence presented is contained in

1RP 4, 47. Williams could not, however, remember her address when Parker wanted to drive there. 1RP 4, 47. Williams told another officer that he did not have a license or identification, had recently moved, did not know his new address and did not recall his social security number or driver's license number. 1RP 51-52, 56-57.

Williams ultimately admitted that his name was Michael D. Williams and that he had lied about his name because he had not wanted to get arrested on an outstanding warrant. 1RP 61, 2RP 33-37.

Williams was charged with and convicted after bench trial of, *inter alia*, making a false or misleading statement to a law enforcement officer and obstruction, both for giving the false name to police. CP 1-2, 35-37; 2RP 58-68.[2] On appeal in Division Two of the court of appeals, Williams argued that the obstruction statute did not apply to his speech as a matter of law. Brief of Appellant ("BOA") at 6-15. Division Two affirmed, holding in a published decision that the obstruction statute applied to pure speech. State v. Williams, 152 Wn. App. 937, 219 P.3d 978 (2009),

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Appellant's Opening Brief ("AOB") at 1-6.

[2]The verbatim report of proceedings consists of five volumes, which will be referred to as follows:

January 30, 2008, as "1RP;"
February 4, 2008, as "2RP;"
February 8, 2008, as "3RP;
March 14, 2008, as "4RP;"
April 11, 2008, as "5RP."

review granted, 168 Wn.2d 1022 (2010).

D. ARGUMENT

APPLYING THE RULES OF STATUTORY CONSTRUCTION AND *STARE DECISIS* LEADS TO THE INEVITABLE CONCLUSION THAT THE OBSTRUCTION STATUTE DOES NOT APPLY TO PURE SPEECH

The issues in this case all turn on the proper interpretation of RCW 9A.76.020(1), the current version of the statute defining the crime of obstructing a law enforcement officer. Williams was convicted of both making a false or misleading statement and "obstruction" for giving police a false name. CP 1-2, 35-37; 2RP 58-68. On appeal, the court of appeals upheld the "obstruction" conviction, holding that the statute, RCW 9A.76.020(1), applied to pure speech. Williams, 152 Wn. App. at 943. That holding, however, failed to apply the basic rules of statutory construction, ignored decisions of this Court and the courts of appeals in violation of the doctrine of *stare decisis* and improperly expands the scope and application of the obstruction statute to a degree which raises serious questions about the First Amendment protections affected whenever speech is criminalized by the government.

Division Two's decision failed to apply several fundamentals of statutory construction. One of those fundamentals is that the "plain meaning" of a statute is not determined simply based upon the ordinary

meaning of the statutory language but also "from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). After such examination, if the statute is "still subject to more than one reasonable interpretation, it is ambiguous" and a further fundamental rule - the rule of lenity - requires the court to interpret the statute in favor of the defendant, absent legislative intent to the contrary. Id.

Here, Division Two did not properly apply these mandates of statutory interpretation. Instead, it focused *only* on the dictionary definitions of the terms "hinders," "delays" and "obstructs," concluding that those definitions do not "treat conduct and speech differently" so that the obstruction statute's "plain language" thus indicates that it governs pure speech. Williams, 152 Wn. App. at 943.

But if the statute's "plain language" was so clear, then certainly this Court and the courts of appeals would not have found, to the contrary, that the "hinders, delays or obstructs" language applied to conduct or conduct mixed with speech but not pure speech. See White, 97 Wn.2d at 101 ("hinders, delays or obstructs" applies to "conduct rather than speech"); Grant, 89 Wn.2d at 685-86 (same); State v. Lalonde, 35 Wn.

App. 54, 59, 665 P.2d 412, review denied, 100 Wn.2d at 1014 (1983) (same); see also State v. C.L.R., 40 Wn. App. 839, 841-42, 700 P.2d 1195 (1985) (statute requires "action or inaction" which actually hinders, delays or obstructs).

Indeed, the very fact that this Court and the courts of appeals have all reached conclusions markedly different than the one reached by Division Two in this case is a clear indication that reasonable minds can differ about the proper interpretation of the statute, because they *have*. See e.g., In re Charles, 135 Wn.2d 239, 249, 955 P.2d 798 (1998) (a statute is ambiguous when it is subject to more than one reasonable interpretation). Where a statute is ambiguous, the rule of lenity mandates that the court adopt the interpretation most favorable to the defendant - in this case, that the obstruction statute applies only to conduct or conduct mixed with speech but not pure speech. See id.

Further, Division Two's interpretation, based solely upon dictionary definitions, not only failed to consider the statute's context, related provisions and the statutory scheme as a whole - it ignored them. Williams, 152 Wn. App. at 943-45. But those factors make it clear that the obstruction statute was not intended to govern pure speech and instead such speech was intended to be governed by the crime of making a false or

misleading statement under RCW 9A.76.175. Both obstruction (RCW 9A.76.020) and the false statement crime (RCW 9A.76.175) are defined in the same section of the RCW - Title 9A.76, which governs "Obstructing a Governmental Operation." Further, both obstruction and making a false statement were once the same crime - the crime of obstruction. Under former RCW 9A.76.020 (1975), it was "Obstruction of a Public Servant" to 1) refuse to furnish information lawfully required by a public servant, 2) knowingly make an untrue statement to such a servant, or 3) "knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers or duties." See, e.g., Williamson, 84 Wn. App. at 43.

Thus, in the past, both speech and conduct which hindered or impeded officers in their official duties were criminalized in the same statute as separate means of committing the same offense.

While the statutory scheme has changed since then, the distinction still remains. In 1982, this Court invalidated the first two subsections of the 1975 obstruction statute - the ones addressing speech - as unconstitutionally vague. See White, 97 Wn.2d at 101. In reaching this conclusion, the Court specifically noted that the third subsection, the "knowingly hinder" means of committing obstruction, applied to "conduct rather than speech." 97 Wn.2d at 95, quoting, Grant, 89 Wn.2d at 96.

The courts of appeals agreed. In Hoffman and Swaite, the courts held that the Legislature had intended the two subsections invalidated in White to apply to false and misleading statements, but the subsection involving hindering, delaying or obstructing to apply to conduct. Hoffman, 35 Wn. App. at 16; Swaite, 33 Wn. App. at 483. The Hoffman and Swaite courts therefore rejected arguments that the "hinders, delays or obstructs" subsection of the statute applied not only to "obstructive conduct" but also speech. Hoffman, 35 Wn. App. at 16; Swaite, 33 Wn. App. at 483; see Williamson, 84 Wn. App. at 43.

Indeed, the court of appeals specifically upheld the "knowingly hinder" subsection of the obstruction statute because it did not regulate speech, but only conduct. State v. Lalonde, 35 Wn. App. at 59; see State v. Graham, 130 Wn.2d 711, 716 n. 2, 927 P.2d 227 (1996). In Lalonde, the Court reached its conclusion after applying a standard for examining statutes which did *not* involve speech and thus did not implicate First Amendment rights, based upon its conclusion that the "knowingly hinder" section of the obstruction statute did not regulate pure speech but rather conduct. 35 Wn. App. at 59.

Thus, after White, the only portion of the obstruction statute which remained intact was the third means, i.e., the "knowingly hinder, delay, or

obstruct" means. The attempts of prosecutors to charge defendants with obstruction under the "knowingly hinder" subsection for giving false statements were rejected, because the hinders, delays and obstructs language was held to govern conduct, not speech. See Williamson, 84 Wn. App. at 43.

In 1994, the Legislature finally amended the obstruction statute in response to White. See Graham, 130 Wn.2d at 716 n.2. With those amendments, the Legislature deleted the portions of the statute the White Court had found improper and set forth two separate means of committing the offense, now described as "obstructing a law enforcement officer." See Laws of 1994, ch. 196, § 1[3]; see Graham, 130 Wn.2d at 716 n. 2. The two means of committing obstruction were now 1) willfully hindering, delaying or obstructing an officer in the discharge of official powers or duties, as before, and 2) willfully making a false or misleading statement while detained during the course of a lawful investigation or arrest. Laws of 1994, ch. 196. § 1; see Williamson, 84 Wn. App. at 44.

Despite the indication in White that the language relating to hindering, delaying and obstructing related only to conduct, however, with

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[3]The offense was also raised from a misdemeanor to a gross misdemeanor, and the *mens rea* amended from "knowingly" to "willfully," although Division Three has found that this change in language did not amend the actual *mens rea* required. See Laws of 1994, ch. 196; Bishop v. Spokane, 142 Wn. App. 165, 173 P.3d 318 (2007).

the 1994 changes, the Legislature did not amend that statutory language or in any way indicate that it intended that subsection to apply to speech in addition to conduct. Laws of 1994, ch. 196, § 1. Nor did it make any such changes a short time later when, in 1995, it again amended the statutory scheme. See Laws of 1995, ch. 285, §§ 32, 33. Those amendments removed the "false or misleading statement" means of committing the crime of obstruction, retaining only the "willfully hindering" means. Laws of 1995, ch. 285, §§ 32, 33. At the same time, a new crime was created, codified in RCW 9A.76.175, which now provided:

> A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. 'Material statement' means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

RCW 9A.76.175; see Laws of 1995, ch. 285, §§ 32, 33.

Thus, today, the former all-encompassing crime of "obstruction" which governed both conduct and speech has now been split into two statutes and two separate crimes - obstruction under RCW 9A.76.020 and making a false or misleading statement under RCW 9A.76.175. The structure and context of the obstruction statute as juxtaposed with the false or misleading statement statute and the history of the two crimes retained

the division between speech and conduct that this Court found in the statute's earlier iteration in White and the court of appeals found in cases such as Williamson. In holding to the contrary and finding that the obstruction statute *also* governed pure speech, Division Two not only ignored the ambiguity in the obstruction statute and failed to apply the rule of lenity but also failed to take into account the statute's context and history and the caselaw interpreting it. In so doing, it effectively overruled all that caselaw *sub silentio.* This flies in the face, however, of the mandates of *stare decisis.*

Under that doctrine, "decisions of the courts of last resort are held to be binding on all others." State v. Ray, 130 Wn.2d 673, 677, 976 P.2d 904 (1996), quoting, State ex rel. State Fin. Comm. v. Martin, 62 Wn.2d 645, 665-66, 384 P.2d 833 (1963). This includes interpretations of a statute. State v. Law, 154 Wn.2d 85, 102-103, 110 P.3d 717 (2005). Absent a conclusion by the appellate court that those prior interpretations were "incorrect and harmful" and thus override the public policy interests served by *stare decisis*, this Court's interpretation is binding on lower appellate courts. Law, 154 Wn.2d at 102-103. This is because *stare decisis* is what "makes for stability and permanence" in the law, "holds the courts of the land together," makes those courts into a "system of justice"

and gives them "unity and purpose." 130 Wn.2d at 677, quoting, Martin, 62 Wn.2d at 665-66. Without *stare decisis*, this Court declared:

> the law ceases to be a system; it becomes instead a formless mass of unrelated rules, policies, declaration and assertions- a kind of amorphous creed yielding to and wielded by them who administer it. Take away *stare decisis*, and what is left may have force, but it will not be law.

Ray, 130 Wn.2d at 677, quoting, Martin, 62 Wn.2d at 665-66.

In White and Grant this Court held that the "hinders, delays or obstructs" language applied to conduct, not speech. See White, 97 Wn.2d at 95; Grant, 89 Wn.2d at 685-86. Regardless whether Division Two thought those holdings were well-reasoned or supported, they were still bound by *stare decisis* to follow them, unless they made a specific finding that those decisions were "incorrect and harmful." See Law, 154 Wn.2d at 102-103. Not only did Division Two make no such finding, it did not even mention either of these cases or any of the court of appeals cases, such as Williamson, on this point.

Division Two's improper expansion of the application of the obstruction statute also offends the principles of statutory construction set forth by this Court in Bobic, 140 Wn.2d 250 at 264. Under Bobic, the Legislature is deemed to be aware of court interpretations of statutory language and the failure to amend that language or indicate a disagreement

with prior court interpretations indicates an acquiescence with that interpretation. Bobic, 140 Wn.2d at 264.

Here, when the Legislature finally amended the obstruction statute in response to White in 1994, it clearly was aware of this Court's declaration, in White, that the "hinders, delays or obstructs" language governed conduct, not speech. And it was certainly aware of the court of appeals decisions on this point. It nevertheless made no changes to that section and instead added a new subsection specifically governing false statements. Laws of 1994, ch. 196. § 1; see Williamson, 84 Wn. App. at 44. If it had believed that the "hinders, delays or obstructs" language *should* apply to pure speech, contrary to White, the Legislature could clearly have declared that disagreement with this Court, as it has wont to do. See, e.g., Laws of 2003, ch. 3, § 1 (Legislature specifically disapproving of Supreme Court interpretation of felony-murder statute in amending that statute). Not only did it not do so, it added a new section to govern speech, obviously agreeing that the existing statute obviously did not already do so.

Nor did the Legislature indicate any different intent a short time later when, in 1995, it again amended the statutory scheme to eliminate the "false or misleading statement" means of committing obstruction and

created a new crime of making such a statement to an officer. See Laws of 1995, ch. 285, §§ 32, 33.

Under Bobic, the Legislature's failure to materially change the language defining the "hinders, delays or obstructs" means of committing obstruction - now the *only* means of committing that crime - indicates that it intended that crime to apply to conduct only, as this Court held in White, as it had previously indicated in Grant, and as the courts of appeals had previously held in Hoffman and Swaite. Further, despite its several amendments to the statute since White, the Legislature has *never* changed the language in order to indicate that it wanted the "hinders, delays or obstructs" subsection to apply to pure speech. Nor has the Legislature ever indicated any intent to contravene the various courts' previous holdings that the "hinders, delays or obstructs" subsection should *not* apply to speech but only conduct.

Indeed, by creating a separate subsection and then a separate crime specifically addressing speech, the Legislature has signaled its intent that it meant for speech to fall under those provisions, not the "hinders, delays or obstructs" provision which now makes up the sole means of committing obstruction.

Additional evidence for this distinction between speech and

conduct under the current legislative scheme and the inapplicability of RCW 9A.76.020(1) to speech is found in the additional requirement of RCW 9A.76.020(1) that *actual* hindering, delaying or obstructing must have occurred for the crime of obstruction to have been committed. For example, in State v. Conteras, 92 Wn. App. 307, 316, 966 P.2d 915 (1998), the Court found probable cause to support a warrantless arrest because Contreras had disobeyed the officer's orders to put his hands up in view, disobeyed orders to get out of the car, disobeyed orders to keep his hands on the top of the car and given a false name. 92 Wn. App. at 316. *Aside* from the speech, Contreras' "additional actions" had in fact hindered and delayed the officers' investigation, and thus, the Court held, the officers properly arrested the defendant for obstructing. 92 Wn. App. at 316. But in C.L.R., supra, the officer made an arrest without any further effort despite the defendant yelling to the suspect, "he's vice." 40 Wn. App. at 841-42. Because the officer was not in fact hindered, delayed or obstructed from making the arrest, there was insufficient evidence to prove obstruction under the "hinders, delays or obstructs" means of committing the offense. 40 Wn. App. at 842-43.

In contrast to the requirement of actual impact on an investigation or conduct of official duties necessary to prove obstruction, the Legislature

chose not to require that an officer actually have relied on a false statement for the making of that speech to be a crime. 9A.76.175 makes it a crime for a person to knowingly makes a false or misleading statement which is material, i.e., "reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties." It is not necessary that an officer *actually* rely on such a statement - only that the statement be one that an officer is "reasonably likely" to rely on. See State v. Godsey, 131 Wn. App. 278, 290-91, 127 P.3d 11, review denied, 158 Wn.2d 1022 (2006). Thus, merely giving a false name to an officer is sufficient to prove commission of the "false statement" offense, regardless whether the officer actually believed the false name or was in any way impeded by the falsity. 131 Wn. App. at 290-91.

This distinction between the crimes of obstruction and making a false statement makes sense only if it is based upon the difference between conduct and speech. Whereas a person's conduct usually either affects an officer or does not at the moment it occurs, speech, if misleading, carries consequences far more removed from the initial statements. For example, a person who refuses lawful orders to stop, flees or fights an officer immediately impacts that officer's ability to perform his or her duties, at the moment the defendant's conduct occurs. See, e.g., State v. Hudson,

56 Wn. App. 490, 496, 784 P.2d 533, review denied, 114 Wn.2d 1016 (1990). In contrast, a person who gives a false name or statement may not immediately affect an officer's ability to perform their job, such as here, where Williams was taken into custody anyway. But those statements may have great potential impact in the future, by misleading officers as to relevant parts of an investigation, causing them to investigate the wrong person, or causing them to release someone improperly based upon a mistaken belief as to identity.

Thus, by creating the separate crime of making a false statement, the Legislature obviously wanted to ensure that correct information was given to officers at the time it was requested, without requiring proof of detrimental reliance which might not occur until far later. The obstruction crime, however, serves to prevent conduct which results in actually impeding officers in their official functions, at the time those functions are being performed. The Legislature therefore ensured that the conduct and speech would be punishable at the time they occurred, but under different criminal statutes which once were joined.

It is important to remember that statutes criminalizing speech are subject to special scrutiny by courts to ensure the government does not infringe upon First Amendment protections. See e.g., Lalonde, 35 Wn.

App. at 59. The statutory language defining a crime when someone "hinders, delays or obstructs" has not been subjected to such scrutiny, precisely because it has not been held to encompass speech. See id; see also, White, 97 Wn.2d 95. If that interpretation of the statute is held not to be correct, further litigation on the validity of the statute, in light of its impact on speech, will likely be required.

Finally, because the court of appeals erroneously concluded that the obstruction statute applied to Mr. Williams' speech, it also erroneously concluded that counsel was not ineffective for failing to object to that application. Williams, 152 Wn.2d at 944-45. The statute did not apply and this Court should also hold counsel ineffective for his failure to object to its application below, so that new counsel can be appointed to Mr. Williams on remand.

E. CONCLUSION

DATED this _____ day of _____, 2010.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Supplemental Brief to opposing counsel and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows:

To: Kimberley Ann De Marco, Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave S., Tacoma, WA. 98402;

To: Michael D. Williams, DOC 734664, c/o CCO Erin Wright, 10109 S. Tacoma Way, Bldg C., Suite 4, Lakewood, WA. 98499-4665.

DATED this _____ day of _____, 2010.

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